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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ARMANDO OSUNA, Defendant and Appellant.	E070141 (Super.Ct.No. FSB17002446) OPINION

APPEAL from the Superior Court of San Bernardino County. Gregory S. Tavill, Judge. Affirmed.

Richard Power, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel, Meredith White and Laura Baggett, Deputy Attorneys General, for Plaintiff and Respondent.

Following a trial, the jury found defendant and appellant Armando Osuna guilty of assault and second-degree robbery. As to the robbery conviction, the court sentenced defendant to the middle term of three years imprisonment, explaining it could have ordered probation had defendant not used a gun in the course of committing that crime.

On appeal, defendant argues his due process protections were violated because the sentence for the robbery was not authorized and the court was not fully apprised of the parameters of its discretion with respect to ordering probation. We find no merit in defendant's claims and affirm the judgment.

BACKGROUND

The victim runs a car window tinting business out of his garage in San Bernardino. One late May evening, an hour or so after his regular 7:00 o'clock closing time, the victim was working at his computer in the open garage. Defendant, whom the victim recognized as the brother of one of his employees, walked in and demanded his brother's cell phone. When the victim said he did not have it, an argument began. Defendant pulled a gun out of his pocket and pointed it at the victim's head. He then used the gun to hit the victim under the eye, causing the victim to fall down onto the floor. He hit him with the gun twice more. He grabbed the victim's wallet and cell phone and left.

After leaving the victim, defendant went to a neighborhood grocery and gave the wallet and phone to a cashier with the explanation that he had found them in the parking lot. When the items were returned to the victim, cash that had been in the wallet was missing.

The victim was taken by ambulance to the hospital where repair of the laceration under his eye required three stitches. He also had scrapes on the top of his forehead and his lower left jaw. All of the injuries resulted from being hit with the gun.

Defendant was arrested and charged with robbery (count 1, Pen. Code, § 211[1]) and assault with a deadly weapon (count 2, § 245, subd. (a)(1)). The jury found him guilty of robbery and, as to count 2, guilty of a lesser included charge of simple assault (§ 240).

At the sentencing hearing, defendant requested a mitigated term of two years, and the People asked for an aggravated term of unspecified duration. The court stated there was a chance that the matter could be a probation case except for the use of the gun and found the matter was "not an unusual case" calling for probation instead of a prison term. It sentenced defendant to the midterm of three years imprisonment on the robbery count with credit of 227 days, followed by three to four years of parole. As to the assault charge, the court stayed his sentence pursuant to section 654.

Defendant appealed.

DISCUSSION

Defendant contends the trial court's decision to sentence him to prison rather than to grant probation was based upon its mistaken belief that a gun was used in the course of the robbery and assault of the victim. He argues that, due to the court's misapprehension of the facts, the sentence imposed violated due process because it was unauthorized and

[1] All statutory references herein are to the California Penal Code.

did not take into account the scope of discretion afforded to the trial court to grant probation. We find no merit in defendant's claims.

Subdivision (e) of section 1203 provides in relevant part that, except in unusual cases where the interests of justice will be best served if the defendant is granted probation, if a defendant used or attempted to use a deadly weapon against a person in connection with the perpetration of the crime of which he has been convicted, then that defendant will not be granted probation. (§ 1203, subd. (e)(2).) A gun is a deadly weapon. (*People v. Dixon* (2007) 153 Cal.App.4th 985, 1002.)

Defendant came within section 1203, subdivision (e)(2). He was convicted of robbery in violation of section 211. The record amply supports the trial court's finding that defendant used a gun in the course of committing that crime. The police officer who arrived on the scene within the hour after the robbery testified that the victim told him the injuries to his face resulted from defendant hitting him with a silver gun. The victim also testified that defendant had a gun. When defendant took it out of his pocket, the victim did not know if it was a real gun or a BB gun, but he was certain the weapon was chrome and in the shape of a handgun. He was also sure defendant used a gun to hit him three times, causing injuries to his face.

In view of the evidence that defendant used a firearm during the robbery and the lack of circumstances indicating this was an unusual case where the interests of justice would best be served by granting defendant probation, the trial court did not err when it imposed a prison term.

Defendant argues the prison sentence violated his right to due process because it was not authorized and reflected the trial court's misapprehension that it lacked discretion to place defendant on probation. Both of those claims fail because they are bottomed on his theory, which we find to be without merit, that there was no substantial basis for the court's conclusion he used a gun when robbing the victim.

In support of his theory, defendant posits the trial court could not reasonably have concluded he used a gun because, according to him, the People conceded during closing argument that the weapon might not have been a firearm. The record does not reveal a concession. It reflects only that the People described a portion of the victim's testimony in which he said defendant used a silver gun that could have been a real gun, it might have been a BB gun, but it appeared to be some kind of gun.

Defendant contends that the jury's inquiry whether a weapon was in evidence and its subsequent decision to convict him for simple assault instead of assault with a deadly weapon precluded the trial court from finding during the sentencing phase that defendant used a gun. He is mistaken. The trial court was permitted to take into account conduct related to a charge of which defendant was acquitted so long as the conduct is supported by a preponderance of evidence. (*In re Coley* (2012) 55 Cal.4th 524, 557-558.) As discussed *ante*, there is sufficient support for the court's conclusion that defendant used a gun when he robbed and assaulted the victim.

Defendant also argues that the trial court was confused and misled by what he deems to be erroneous statements in the probation report indicating that defendant used a

gun in the commission of the robbery. We are not persuaded. The information in the report is in keeping with the evidence before the court. Moreover, at the sentencing hearing, defendant's counsel did not object to any of the information submitted by the probation officer. Rather, when asked if he ha\d comments, counsel simply noted the court's familiarity with the facts of the case and requested a two-year term. Unless an objection and offer of proof is made at the sentencing hearing, a defendant forfeits the right to complain on appeal about errors in a probation report. (*People v. Lara* (2012) 54 Cal.4th 896, 907.)

Defendant suggests his counsel's assistance may have been deficient, but he failed to establish either that counsel's performance fell below an objective standard of reasonableness or that it was reasonably probable a more favorable outcome would have been obtained had counsel not been ineffective. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 695.)

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

FIELDS
J.